Petition

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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,
Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

Whether the incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which the First Amendment requires must be met before there can be a criminal conviction based upon speech, must also be met before civil liability can be imposed for negligence when foreseeable physical injury is proximately and actually caused by a television broadcast.

Whether the First Amendment insulates a television broadcast from civil liability, if all of the traditional elements of a cause of action founded upon negligence are satisfied, unless the plaintiff can also prove that the defendants *advocated* the acts resulting in her injury.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

Petitioner Olivia Niemi, a minor, by and through her guardian Ad Litem, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in this proceeding on December 7, 1981.

OPINIONS BELOW

The December 7, 1981 opinion of the California Court of Appeal is reported at 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1981) and is set forth as Appendix A to the petition. The order of the Court of Appeal denying, without opinion, a petition for rehearing is unreported and is set forth as

Appendix B. The California Supreme Court order of February 3, 1982, denying a hearing to review the Court of Appeal decision with two justices voting to grant, is unreported and is set forth as Appendix C. The judgment of nonsuit by the Superior Court of the City and County of San Francisco, which was affirmed by the Court of Appeal, is set forth as Appendix D.

The opinions on a previous appeal in this case are attached as follows: The opinion of the California Court of Appeal rendered October 26, 1977 is reported at 74 Cal. App.3d 383, 141 Cal.Rptr. 511 (1977) and set forth as Appendix E. The unreported order of the Court of Appeal denying, without opinion, a petition for rehearing is Appendix F. The unreported order of the California Supreme Court denying a hearing to review the Court of Appeal decision is Appendix G. This Court's denial of a petition for writ of certiorari filed by the respondents to the present petition, reported at 435 U.S. 1000 (1978), is Appendix H. The opinion of Mr. Justice Rehnquist issued on respondents' application for a stay while their petition for certiorari was pending, reported at 434 U.S. 1354 (1978), is Appendix I. The Memorandum of Intended Decision, the Judgment, and the Finding of Fact and Conclusions of Law of the Superior Court of the City and County of San Francisco, reversed by the Court of Appeal on that appeal, are set forth as Appendices J, K, and L respectively.

JURISDICTION

The judgment of the Court of Appeal was entered on December 7, 1981. A timely petition for a hearing to the Supreme Court of California was denied by order entered

February 3, 1982. This petition has been filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1253(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Factual Summary

This present case arises out of an unusual and brutal sexual assault upon petitioner (plaintiff) Olivia Niemi, a child of 9, by several other youngsters.[1] Petitioner was

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[1]The assault was an "artificial rape" and consisted of repeated thrusts of a beer bottle into petitioner's vagina. The TV movie, called "Born Innocent", had shown a 12-year-old girl being "artificially raped" with a plumber's helper. It was broadcast by the major television network, respondent National Broadcasting Company, Inc. (NBC). Respondent Chronicle Publishing Company is NBC's local station.

prepared to prove through extensive testimony, which she outlined in a six hour opening statement, that her assailants were foreseeably stimulated to attack her as a proximate result of respondents' broadcast of a similar attack in a fictional, made-for-TV movie aired a few days previously. She was never able to present her case to the jury.

The following summary of facts is taken from petitioner's counsel's opening statement. These statements must be accepted as true because respondents' motion for nonsuit on petitioner's opening statement was granted and judgment of dismissal was ordered and affirmed.

1. Medical experts were of the opinion that the broadcast was medically dangerous. It both made the assault upon petitioner likely and actually caused it.

2. Respondents broadcast the movie at 8:00 p.m. during the prime-time "family hour." They engaged in a week or two of promotional campaign for the show in order to heighten the interest of children in watching it and to deceive parents into letting their children watch it. For example, respondents had introduced a new series called "Born Free", which was a family program about lion cubs, shown in the same time slot, the evening before. The TV Guide ads were so deceptively similar that even parents could be easily confused between them. No audio warning concerning what was to be shown was made before or during the program.

3. Respondents falsely represented to Congress that they were careful not to broadcast potentially harmful violence, especially during the early evening hours that they

knew attracted large numbers of children viewers, and that they would do studies to protect their young audience and safeguard it in this area of sensitive concern. In fact, respondents did little if any research, knew that the broadcast was dangerous, and violated their own standards by broadcasting it. They did so in order to get the highest possible viewing audience, Nielsen ratings and advertising revenues during this first week of the new season.

4. If the "artificial rape" scene had been shown in a movie theater, it would have been X-rated. The President of the American Broadcasting Company (ABC) thought the scene was too graphic and would be offensive at any time it was shown.

5. The "artificial rape" scene bore no relationship to the presentation of the story. After complaints had been made by the public, respondents again aired "Born Innocent" without this scene and with no problem resulting.

6. The juveniles who committed the "artificial rape" on petitioner admitted that they had been stimulated to do it by viewing the "artificial rape" scene on television.

7. The "artificial rape" scene contained all of the elements that the medical profession has found to cause youths and adolescents to be stimulated to commit the same act viewed.

The trial court, and all the state appellate courts which reviewed the matter, held that in addition to proving all the traditional elements of a negligence case (duty, breach of duty, actual causation, proximate causation and dam-

ages), which petitioner asserted she could, and respondents assumed she would, she could not prevail unless she also proved that the respondents intended to hurt her by advocating such an attack. This result was reached because the view was adopted that broadcasters are entitled to a high degree of First Amendment protection and cannot be held civilly accountable for the foreseeable harm caused by their speech unless they *incited* the attack within the meaning of that word articulated by this court in *Brandenburg v. Ohio, supra,* 395 U.S. 444, 447.

In short, the episode and the resulting injury to petitioner, is a classic example of the tragic effects of televised violence which has been the focus of much public concern from all quarters in recent times.

PROCEDURAL HISTORY

Petitioner's Theory of Liability Was Always Stimulus.

Petitioner's theory of liability was that respondents had acted negligently, recklessly and wilfully. The first time the case went to trial, the trial court viewed the movie and entered judgment for respondents because it ruled that the broadcast did not incite viewers to attack little girls. The Court of Appeal reversed. *Olivia N. v. National Broadcasting Co., supra,* 74 Cal.App.3d 383, 141 Cal.Rptr. 511; Appendix E.

It first acknowledged that petitioner's theory of the case was that she had been injured "by certain juveniles who were *acting upon the stimulus of observing a scene of*

brutality which had been broadcast in a television drama entitled 'Born Innocent.'" 74 Cal.App.3d at 386; Appendix E at p. 1. (Emphasis added.)

It then concluded that petitioner was entitled to present evidence before a jury to show that the film resulted in actionable injuries, citing *Weirum v. RKO General, Inc.*, 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 (1975).[2] 74 Cal.App.3d at 389-390; Appendix E, p. A-20. The California Supreme Court denied respondents' petition for hearing and this court denied respondents' petition for certiorari.

Justice Rehnquist Ordered the Case To Proceed to Jury Trial on Petitioner's Theory of Stimulus.

While respondents' petition for certiorari was pending, they sought a stay of the trial. The stay was denied by Justice Rehnquist, *National Broadcasting Co. v. Niemi, supra,* 434 U.S. 1354. Appendix I.

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[2]In *Weirum*, the California Supreme Court held that an action could be brought against a broadcaster under traditional negligence principles when the broadcast created a foreseeable risk that listeners would respond to the broadcast in a manner that would injure a third party. Immediately following its finding of a duty under negligence law, the *Weirum* court rejected the broadcaster's reliance on the First Amendment as "clearly without merit." (At 48.) It then stated:

> The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. *The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act (Ibid. Emphasis added.)*

Justice Rehnquist, too, acknowledged that petitioner's theory of the case was not incitement. He reiterated that she sought damages for injuries inflicted on her by persons:

> acting under the *stimulus* of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." 434 U.S. at 1354, Appendix I, p. A-25. Emphasis added.

He then ordered the case to proceed to trial before a jury.

The Court of Appeal Ignored Justice Rehnquist's Opinion and Rendered a Decision That Conflicted With It.

When the case then went to trial, petitioner was denied her constitutional right to present any evidence to the jury on her theory of the case. A nonsuit on her opening statement was entered and affirmed as discussed above.

In a total repudiation of Justice Rehnquist's opinion, the Court of Appeal held that the First Amendment to the United States Constitution rendered a broadcaster immune from liability in an action for foreseeable physical injuries resulting from any negligent, reckless or malicious acts. It held that the First Amendment provides an absolute defense to any such liability because a television broadcast constitutes speech. Relying upon the criminal incitement standard of *Brandenburg v. Ohio, supra,* 395 U.S. at 433-434, the Court of Appeal required petitioner to prove that respondents' broadcast *advocated* the artificial rape of a child by viewers *and* was directed to inciting or producing such criminal action. Appendix A, pp. 4-8.

Petitioner, of course, had acknowledged that she could not prove this intentional conduct. In spite of their greed for corporate profit and their knowledge that imitation was likely, respondents hardly urged viewers to go out and attack little girls.

The Court of Appeal Held That This Court's Decision in F.C.C. v. Pacifica Foundation Had No Application in a Tort Case.

The Court of Appeal demonstrated its serious misunderstanding of First Amendment law by dismissing this court's decision in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) as being limited to regulation and as not involving the imposition of tort liability. (Appendix A, p. 10.) There, a radio station had broadcast George Carlin's satiric monologue entitled "Filthy Words" at 2:00 o'clock in the afternoon. (At 729-730.) A father who heard the broadcast while driving with his young son complained to the F.C.C. (At 730.) The broadcast was unquestionably *not* obscene. The F.C.C. found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, and, noting the time of the broadcast, concluded that it was "indecent" and therefore prohibited by federal law. (At 731-732.)

The radio station unsuccessfully attacked the F.C.C.'s proscription of the broadcast on both statutory *and constitutional grounds*. In upholding the F.C.C.'s position, this Court reiterated at 748-749:

> We have long recognized that each medium of expression, presents special First Amendment problems.

[Citations.] *And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.*

. . . .

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely prevasive presence in the lives of all Americans.

. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read.

REASONS FOR GRANTING THE WRIT

I

THE DEGREE OF PROTECTION THAT THE FIRST AMENDMENT GIVES TO TELEVISION BROADCASTING WHICH HAS FORESEEABLY CAUSED PHYSICAL HARM INVOLVES SERIOUS QUESTIONS OF SOCIAL POLICY THAT NEED TO BE ADDRESSED BY THIS COURT.

A. The Effects of Televised Violence Have Become a Major Problem.

The Court of Appeal opinion has the effect of immunizing all broadcasters, and indeed perhaps all defendants who foreseeably cause physical harm by the vehicle of speech, from liability unless they intended to cause such harm. This result is an unnecessary, unwise, unprecedented, unreasoned, and radical departure from traditional tort principles in the name of First Amendment rights. The Court of Appeal decision failed to address, or even to acknowl-

edge, the existence of any interface at all between negligence law and the First Amendment. By contrast, this court has indicated that there can be a significant difference between seeking civil damages for harm caused by a broadcast, as opposed to an attempt to prevent it from occurring. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565-566, 573-575, 578 (1977).

The present case starkly presents a unique challenge to this court to address fully important issues of social policy concerning the relationship between negligence law and the First Amendment, now cast into doubt. It is particularly important that this court do so at this juncture because the pervasive nature of television, hardly forseen by the framers of the First Amendment, raises problems requiring careful and thoughtful analysis that have not heretofore been directly addressed.[3]

The following statements regarding television must also be accepted as true, since they are taken from petitioner's opening statement:

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[3]This issue now has been raised and decided in several cases throughout the United States. See, e.g., *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D.Fla. 1979); *De Filippo v. National Broadcasting Co., Inc.* (pending before Rhode Island Supreme Court). It has also been the subject of several Law Review articles. See, e.g. Krattenmaker and Powe, "Television Violence: First Amendment Principles and Social Science Theory" 52 Va.L.Rev. 1123 (1978); Albert, "Constitutional Regulation of Televised Violence" 52 Va.L.Rev. 1299 (1978); Comment, "Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis" 52 U.So.Cal.L.Rev. 529 (1979).

1. Since the invention of television approximately 25 years ago, about 98 percent of the country's population have acquired televisions and the average home has two sets. By the time a youngster reaches the age of 17, he has spent as much time in front of the television screen as he has either in school or sleeping. Television violence had become a serious problem by the late 1960's.

2. In 1969, the Federal Communications Commission held hearings on the subject of television violence at which a top NBC official testified that children imitate what they see. The majority of behavioral psychologists and psychiatrists in the field had also found that there was modeling and imitation by young people of certain violence they saw on TV.

3. In 1972, the Surgeon General formed a commission to study TV violence because it had grown worse. The Commission produced a report signed by respondents' only psychologist. In short, the consensus remained unchanged: although there was no positive proof, the strong belief was that children imitate and model what they see on television and that viewing television violence increases the likelihood of subsequent similar aggressive behavior by children.

4. Respondents were well aware of the psychology of stimulation, imitation and modeling. Television advertising is itself based on it.

5. There are millions of young people like petitioner's assaulters who have latent aggression that can be triggered by watching a television broadcast such as the

graphic, lengthy "artificial rape" scene in "Born Innocent". Respondents knew that broadcasting the scene was like "playing with dynamite." Indeed, respondents violated their own standards by the manner of presenting the "artificial rape" scene.

* * * * *

The time is thus ripe for this court to set guidelines for the degree of First Amendment protection that should be afforded the television industry when their conduct actually, and predictably, results in physical harm.

B. The Extent to Which the First Amendment Affords a Defense to a Tort Action For Physical Injury Requires Clarification.

The primary purpose of the First Amendment is to further the communication of ideas and information. As this court stated in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969):

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, . . . [Citations.] [S]peech concerning public affairs is more than self-expression; it is the essence of self-government. [Citations.]
>
> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." (See also *Columbia Broadcasting v. Democratic Committee*, 412 U.S. 94, 102, 122 (1973).)

Speech that clearly does not even minimally serve those goals, such as obscenity, is not protected by the First Amendment at all. At the other extreme, political statements are given the highest protection of privilege. Along the continuum between these types of speech, there are many kinds of speech in varied situations which are entitled to more or less protection depending on the entire circumstances. (See discussion in sections IIB and IIC below.)

The time-honored place of the First Amendment in our jurisprudence is such that its invocation tends to carry great weight. Its importance can, however, and did in this case, obscure the fact that it is only one among many values in our society, and its protection is not absolute. When conduct involves speech, there is a temptation to assign it high social utility because of our nation's commitment to freedom of speech. However, the high purposes of the First Amendment should not be debased by blindly invoking its protection in cases where the community has a greater interest than allowing speech to go unfettered. The First Amendment was never intended to be used as a shield from liability for the physical harm caused by one's negligence. The right of us each to be compensated for injuries negligently caused us by our fellows is also an important basic value. *Gertz v. Robert Welch, Inc.*, 481 U.S. 323, 341-349 (1974).

It is for precisely this reason that the *Brandenburg* test is inappropriate here. It involved the criminal prosecution of a person who wished to express an unpopular political view. Nothing even remotely similar is involved in cases such as this, which only seek to hold the broadcaster civilly

responsible for the foreseeable harm actually and proximately caused by a broadcast.

II

TO REQUIRE PROOF OF INCITEMENT UNDER BRANDENBURG v. OHIO EFFECTIVELY GIVES IMMUNITY TO TORTFEASORS WHO HAVE NEGLIGENTLY CAUSED PHYSICAL HARM THROUGH THE VEHICLE OF SPEECH.

A. Since Broadcasting Is Given Less Protection Than Other Forms of Speech, To Immunize It will Have a Serious Adverse Effect on Other Branches of Tort Law.

The Court of Appeal held that the First Amendment required petitioner to prove incitement. Its reasoning was that respondents could not be held accountable under negligence law because television broadcasts are generally accorded protection under the First Amendment. (Appendix A pp. 4-8.) While it is true that broadcast speech falls within the First Amendment, this court has held that of all of the types of speech, broadcasting is entitled to the *least* protection. *F.C.C. v. Pacifica Foundation, supra,* 438 U.S. 726, 748-750; *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. 367, 386-390, 400-402; *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-506 (1952).

The implication which will remain if this court does not intervene is that if broadcasting becomes immune from negligence liability, then all forms of speech must now be immune from negligence liability, precisely because they are accorded more First Amendment protection than broadcasting, not less.

B. The Analysis of the Court of Appeal Set a Dangerous Precedent By Not Using a Balancing Approach to the Interface Between the First Amendment and Tort Law.

The Court of Appeal fell into error, and set a dangerous precedent for constitutional analysis that is out of step with modern constitutional doctrine, because it adopted the following approach to deciding what protection should be given to broadcasting:

> Respondents had divided all speech into two mutually exclusive categories: that which is "protected" by the First Amendment and that which is "unprotected" by the First Amendment. Respondents then characterized as "unprotected" speech, certain very limited categories which this court has held to fall outside the First Amendment entirely, namely: obscenity, libel, fighting words, and incitement. See *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942). Since the "artificial rape" scene did not fall within any of these "unprotected" categories, it had to be made to fall either within the category it most closely resembles, incitement, or it had to be "protected" totally, rendering respondents immune from liability for injury.

The Court of Appeal accepted this analysis and required "incitement" by holding that the television broadcast of "Born Innocent" is "entitled to First Amendment protection" and does not fall within the "scope of unprotected speech." (Appendix A, pp. 5, 7. See also Appendix D, pp. A-13-A-14.)

This method of analysis contains a serious and fundamental error. This simplistic distinction between "protected" and "unprotected" speech is not the modern approach to such problems used by this court. The categories

listed above have been considered totally "unprotected" in the sense that they are not even treated as speech within the meaning of the First Amendment at all. The rest of speech, which comes within the ambit of the First Amendment, is not, however, thereby protected without limitation. The First Amendment has never offered absolute protection to everyone who wished to say anything at any time for any reason. As Justice Holmes recognized long ago, no one has the right falsely to shout "Fire" in a crowded theater. *Schenck v. United States,* 249 U.S. 47, 52 (1919).

Rather, in order to determine whether the First Amendment protects any given speech, this court applies a balancing test giving weight to myriad concerns. This court should grant certiorari in the present case to make clear that no different analysis should, or need, be used where television broadcasting is involved.

The balance in the present case should be struck in favor of imposing liability for the following reasons which are consistent with First Amendment analysis itself.

First, broadcasting is a unique medium which has a pervasive presence in and influence over our lives. *F.C.C. v. Pacifica Foundation, supra,* 438 U.S. 726, 748-750. *Columbia Broadcasting v. Democratic Committee, supra,* 412 U.S. 94, 128. Even decisions of this court which have accorded protection to commercial speech specifically left open possible different results if broadcasting were involved and its unique problems were presented. *Bigelow v. Virginia,* 421 U.S. 809, 818 (1975); *Virginia Pharmacy Board v. Va Consumer Council,* 425 U.S. 733 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350, 384 (1977).

Second, the time, place and manner of respondents' broadcast was unreasonable. *Kovacs v. Cooper*, 336 U.S. 77, 85-86, 89 (1949); *Grayned v. City of Rockford*, 408 U.S. 104, 116, 120 (1972); *Young v. American Mini-Theatres*, 427 U.S. 50, 62-63, 66 (1976); *F.C.C. v. Pacifica Foundation, supra*, 438 U.S. at 729, 750; see also dissenting opinion at 763-764.

Third, society has an especially strong interest in protecting children. *Ginsberg v. New York*, 390 U.S. 629, 631-633, 634, 639-640; see also Justice Stewart concurring at 648-650; *F.C.C. v. Pacifica Foundation, supra*, 438 U.S. at 750. See also *Capital Broadcasting Company v. Mitchell*, 333 F.Supp. 582, 584 (1971) affd. sub. nom.; *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972).

Fourth, the entire spectrum of respondents' conduct, which included making the scene a lengthy and graphic criminal assault in the first place, not warning viewers properly, and airing the broadcast in the early evening to attract children viewers and increase their Nielsen ratings and advertising revenues, was unreasonable. *California v. La Rule*, 490 U.S. 109, 113-117 (1972); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 459 (1978).

The decisions thus establish that to analyze the problem by categorizing speech as either totally protected without limitation, or as unprotected entirely, is a conceptual mistake from the beginning. If those were the only categories for First Amendment analysis, *F.C.C. v. Pacifica Foundation, supra*, 438 U.S. 729 necessarily had to be decided against the regulation, because the broadcast involved was

admittedly only "indecent" and not "obscene." This court upheld the regulation instead, precisely because the all-or-nothing approach adopted by the Court of Appeal is not the law.

III

THIS COURT SHOULD DECIDE WHETHER TRADITIONAL NEGLIGENCE PRINCIPLES PROVIDE SUFFICIENT PROTECTION TO FIRST AMENDMENT RIGHTS WITHOUT UNDULY CHILLING THE CREATIVE ARTS.

The same type of balancing approach that has always been used when speech is involved can be carried on in a negligence case in order to make the determination of whether a television broadcast unreasonably created a risk of harm. This is simply part of the balancing of policy considerations necessary to reach the social judgment of who should bear the plaintiff's loss under negligence law.[4] Any concern with the "chilling effect" of imposing liability can, should, and will be taken into account in such an analysis. It does not always result in liability, even when harm might be highly predictable.

The broadcasting of news, for example, is of such great utility that it would surely be found to outweigh the risk of harm that might befall a person injured by an imitation

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[4]The question asked in a negligence action is whether, on balance, the risk of harm resulting from an action is unreasonable; that is, whether the utility of the defendant's conduct is outweighed by the gravity and likelihood of harm. Prosser, *Law of Torts*, West Publishing Company, 4th ed. 1971 § 53 pp. 325-326. This involves balancing numerous factors of social policy. See, e.g. *Rowland v. Christian*, 69 Cal.2d 108, 112-113, 70 Cal.Rptr. 97, 443 P.2d 561 (1968).

of something seen on a news broadcast. On the other hand, a gratuitous half-hour program instructing on, but not advocating, the use of torture techniques or methods of committing arson undetected should tip the balance in the other direction.

The Court of Appeal's decision that these distinctions are too blurred (Appendix A, p. 8) is a result of its failure to recognize that traditional negligence law does itself contain substantial protection, and the only protection necessary, to shield media broadcasting defendants from liability where it *should not* attach. Rather, it is the Court of Appeal's decision which is too rigid. Under its analysis, important distinctions based on a risk/utility analysis are lost in favor of a simple all-or-nothing view. Rather than promoting responsible television, the decision sanctions the most reckless conduct even if it foreseeably causes physical harm.

Even if the imposition of civil liability on respondents would result in fewer television scenes like the "artificial rape" which caused four otherwise average children to attack petitioner, not one, but three, important social goals will be furthered:

1. Totally innocent children such as petitioner will not be exposed to the danger of such unusual attacks.

2. Children will pass through their formative years and adolescence without having been subjected to psychological manipulation, making them violence-prone as a result of the same techniques used by advertisers to sell products.

3. The public at large will be benefited by a healthier education of its youth and at least one contribution to violent crimes will be eliminated.

The Court of Appeal's statement that the result of holding for petitioner would be television that is only fit for children (Appendix A p. 7) is that kind of chimerical fear which should be rejected. The courts are well equipped to deny recovery in frivolous lawsuits based upon speech that caused injury where the speech had high utility, such as news. It is simply not negligent to show violent scenes on the news that depict what is really happening in the world, even though it might cause someone to imitate such behavior.[5]

CONCLUSION

Where speech is so dangerous that it advocates and is likely to lead to imminent lawless action, it may be prevented or punished even before the law has been broken as a result of the speech, or even if it never is. This concept is articulated as the "clear and present danger" test. Incitement is an extension of this test. *Dennis v. United States*, 341 U.S. 494, 502-511 (1951); *Brandenburg v. Ohio, supra*, 395 U.S. at 444-447. The value placed on expression

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[5]*Butler v. Michigan*, 352 U.S. 380, 383 (1957), relied on by the Court of Appeal for its concern of reducing television to pabulum (Appendix A, p. 7), actually only held that the state could not entirely ban reading material that was inappropriate for children. *Butler* was distinguished in *F.C.C. v. Pacifica Foundation, supra*, because adults can go to night clubs or buy tape recordings. 438 U.S. at 760 fn. 28. It was for this reason that petitioner argued that liability could be imposed based on time, place and manner violations.

of ideas, and the speculative nature of the outcome of the advocacy, require a high standard to be met before penalties may attach to such speech.

By contrast, where the issue is civil accountability, the violence and harm must already have occurred in order to require the speaker to pay damages. The plaintiff must have proven that the speech actually and foreseeably caused her harm. The court need not second-guess its potential for harm; the reality of harm will have been established. Thus, there is no reason to apply as a standard for civil accountability, the rigorous test which is used to forbid and/or to punish advocacy of harm that only might occur in the future. Therefore, "incitement" where done by a television broadcast should be defined to be the equivalent of *stimulation*, where the audience is apt to include children.

The "artificial rape" scene was likely to stimulate some members of an audience of children to imitate it by similarly attacking another in the future. The unfairness of the Court of Appeal decision is readily apparent: Broadcasters are now immune from liability in spite of the fact that what they do is reasonably foreseeable to have a worse effect than an actual exhortation using words, but not a visual portrayal.

This court should review the entire matter to place the First Amendment protection to be accorded television in proper perspective. For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Dated: April 30, 1982

Respectfully submitted,

MARVIN E. LEWIS
COUNSEL OF RECORD
LEWIS, LEWIS AND LESS
Attorneys for Petitioner

Of Counsel:
DE GOFF AND SHERMAN
VICTORIA J. DE GOFF

(Appendices follow)

Appendix

Appendix A

In the Court of Appeal of the
State of California

First Appellate District, Division Four

1 Civil 46981 (Superior Court No. 681-053)

Filed Dec. 7, 1981

Olivia N., a Minor, etc., Plaintiff and Appellant, v.
National Broadcasting Company, Inc., et al.,
Defendants and Respondents.

OPINION

Christian, J.—Olivia N. appeals from a judgment of nonsuit terminating her action against the National Broadcasting Company and the Chronicle Broadcasting Company. Appellant sought damages for physical and emotional injury inflicted by assailants who had seen a television broadcast of a film drama.

A defense motion for summary judgment was denied, and the case was set for trial by jury. Before impanelment of a jury the trial court viewed the film and determined for itself that the film did not serve to incite violent and depraved conduct such as the crimes committed against the plaintiff and on that basis rendered judgment for defendants.

On appeal from the judgment this court recognized that certain narrowly limited classes of speech may be prevented or punished by the state consistent with the principles of the First Amendment and held that "the trial court's action in viewing the film, and thereupon making fact findings and rendering judgment for respondents, as a violation of appellant's constitutional right to trie by jury." (*Olivia N. v. National Broadcasting Co.* (1977) 74

Cal.App.3d 383, 389 [141 Cal.Rptr. 511].) Therefore, the judgment was reversed with directions to impanel a jury and proceed to trial of the action.

On remand, appellant's counsel in his opening statement to the jury indicated that the evidence would establish negligence and recklessness on respondents' part, rather than incitement.[1] At the conclusion of appellant's opening statement, respondents moved for a judgment of nonsuit (Code Civ. Proc., § 581c, subd. (a)) on the grounds that appellant admittedly could not meet the test for incitement. (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 [23 L.Ed.2d 430, 433, 89 S.Ct. 1827].) Appellant's counsel again acknowledged his inability to meet the incitement test; the trial court granted respondents' motion and rendered judgment dismissing the action. Plaintiff again appealed.

A trial court may grant a defendant's motion for nonsuit only if the plaintiff's evidence would not support a jury verdict in plaintiff's favor. (*Ewing v. Cloverleaf Bowl* (1978) 80 Cal.3d 389, 395 [143 Cal.Rptr. 13, 572 P.2d 1155]; see *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 469 [85 Cal.Rptr. 629, 467 P.2d 229].) Where a nonsuit is granted on the opening statement, factual recitals in the opening statement must be accepted as true. (See *Willis v.*

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[1]Appellant's counsel stated that: "The plaintiffs in this case at no time in this trial are going to prove what is known as 'incitement.'

"At no time in this trial are we going to prove that either through negligence or recklessness there was incitement, which incitement is telling someone to go out encouraging them, directing them, advising them; that there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way.

"So at all times during this trial, I want you to have in mind, ladies and gentlemen, that all of our proof will not be based on any type of incitement, but will be based on stimulation, foreseeability, negligence, proximate cause."

Gordon (1978) 20 Cal.3d 629, 633-634 [143 Cal.Rptr. 723, 574 P.2d 794].)

At 8 p.m. on September 10, 1974, NBC telecast nationwide, and Chronicle Broadcasting Company broadcast locally, a film entitled "Born Innocent." "The subject matter of the television film was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state. In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face. Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a 'plumber's helper,' waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger until one of the four says, 'That's enough.' The young girl is left sobbing and naked on the floor." (*Olivia N. v. National Broadcasting Co., supra,* 74 Cal.App.3d 383, 386.) It is alleged that on September 14, 1974, appellant, aged 9, was attacked and forcibly "artificially raped" with a bottle by minors at a San Francisco beach. (*Id.,* at pp. 386-387.) The assailants had viewed and discussed the "artificial rape" scene in "Born Innocent," and the film allegedly caused the assailants to decide to commit a similar act on appellant. Appellant offered to show that NBC had knowledge of studies on child violence and should have known that susceptible persons might imitate the crime enacted in the film. Appellant alleged that "Born Innocent" was particularly likely to cause imitation and that NBC televised the film without proper warning in an effort to obtain the

largest possible viewing audience. Appellant alleged that as a proximate result of respondents' telecast, she suffered physical and psychological damage.

Appellant contends that where there is negligence liability could constitutionally be imposed despite the absence of proof of incitement as defined in *Brandenburg v. Ohio, supra,* 395 U.S. 444, 447. Appellant argues in the alternative that a different definition of "incitement" should be applied to the present circumstances.

"Analysis of this appeal commences with recognition of the overriding constitutional principle that material communicated by the public media, including fictional material such as the television drama here at issue, is generally to be accorded protection under the First Amendment to the Constitution of the United States. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501 [ ]; *Winters v. New York* (1948) 333 U.S. 507, 510 [ ].)" (*Olivia N. v. National Broadcasting Co., supra,* 74 Cal.App.3d 383, 387.) First Amendment rights are accorded a preferred place in our democratic society. (*Thomas v. Collins* (1945) 323 U.S. 516, 530 [89 L.Ed. 430, 440, 65 S.Ct. 315].) First Amendment protection extends to a communication, to its source and to its recipients. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 756 [48 L.Ed.2d 346, 354, 96 S.Ct. 1817].) "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95 [33 L.Ed.2d 212, 216, 92 S.Ct. 2286]; see *Consolidated Edison v. Public Serv. Comm'n* (1980) 447 U.S. 530, 538-539 [65 L.Ed.2d 319, 328-329, 100 S.Ct. 2326]; *Carey v. Brown* (1980) 447 U.S. 455, 462-463 [65 L.Ed.2d 263, 270-271, 100 S.Ct. 2286]; *Cohen v. California* (1971) 403 U.S. 15, 24 [29 L.Ed.2d 284, 293, 91 S.Ct. 1780]; *New York*

Times Co. v. Sullivan (1964) 376 U.S. 254, 269-270 [11 L.Ed. 2d 686, 700-701, 84 S.Ct. 710, 95 A.L.R.2d 1412].) Applied to the electronic media, the First Amendment means that it is the broadcaster that has authority to make programming decisions. (*Writers Guild of America, West, Inc. v. F. C. C.* (C.D.Cal. 1976) 423 F.Supp. 1064, 1154.)

Motion pictures are accorded First Amendment protections. (*Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495, 501 [96 L.Ed. 1098, 1105, 72 S.Ct. 777].) "[T]he central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey. . . . [T]he central First Amendment concern remains the need to maintain free access of the public to the expression." (*Young v. American Mini Theatres* (1976) 427 U.S. 50, 77 [49 L.Ed.2d 310, 330, 96 S.Ct. 2440] [conc. opn. of Powell, J.]) Freedom of speech is not limited to political expression or comment on public affairs. (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 388 [17 L.Ed.2d 456, 467, 87 S.Ct. 534].) Free speech must "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102 [84 L.Ed. 1093, 1102, 60 S.Ct. 736].) The commercial nature of an enterprise does not introduce a nonspeech element or relax the scrutiny required by the First Amendment. (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 786, fn. 23 [55 L.Ed.2d 707, 724, 98 S.Ct. 1407]; *Buckley v. Valeo* (1976) 424 U.S. 1, 16 [46 L.Ed.2d 659, 686, 96 S.Ct. 612]; *New York Times Co. v. Sullivan, supra,* 376 U.S. 254, 266 [11 L.Ed.2d 686, 698]; *Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495, 501-502 [96 L.Ed.2d 1098, 1105-1106].)

The electronic media are also entitled to First Amendment protection. (See *Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367, 386 [23 L.Ed.2d 371, 386, 89 S.Ct.

1974]; *Columbia Broadcasting v. Democratic Comm.* (1973) 412 U.S. 94, 101-102 [36 L.Ed.2d 772, 782-783, 93 S.Ct. 2080]; *United States v. Paramount Pictures* (1948) 334 U.S. 131, 166 [92 L.Ed. 1260, 1297, 68 S.Ct. 915].) Television broadcasting poses "unique and special problems not present in the traditional free speech case." (*Columbia Broadcasting v. Democratic Comm., supra,* 412 U.S. 94, 101 [36 L.Ed.2d 772, 782]; *Red Lion Broadcasting Co. v. FFC, supra,* 395 U.S. 367, 388 [23 L.Ed.2d 371, 387]; see *Buckley v. Valeo, supra,* 424 U.S. 1, fn. 55 at p. 50 [46 L.Ed.2d 659, at p. 705].) Nonetheless, the First Amendment precludes censorship of programming content even where the restraint is designed to protect children. (See Note, *Regulation of Program Content to Protect Children After Pacifica* (1979) 32 Vand.L.Rev. 1377, 1410-1411.) "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." (*Columbia Broadcasting v. Democratic Comm., supra,* 412 U.S. 94, 110 [36 L.Ed.2d 772, 787].)

Appellant does not seek to impose a prior restraint on speech; rather, she asserts civil liability premised on traditional negligence concepts. But the chilling effect of permitting negligence actions for a television broadcast is obvious. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." (*New York Times Co. v. Sullivan, supra,* 376 U.S. 254, 277 [11 L.Ed.2d 686, 704].) Realistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory. "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." (*New York Times Co. v. Sullivan, supra,* 376 U.S. 254, 278 [11 L.Ed.2d 686, 705].) The deterrent effect of subjecting the television

networks to negligence liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of public debate. (*Id.*, at p. 279 [11 L.Ed.2d at p. 706].)

Although the First Amendment is not absolute, the television broadcast of "Born Innocent" does not, on the basis of the opening statement of appellant's attorney, fall within the scope of unprotected speech. Appellant concedes that the film did not advocate or encourage violent acts and did not constitute an "incitement" within the meaning of *Brandenburg v. Ohio, supra*, 395 U.S. 444, 447-448 (23 L.Ed. 2d 430, 434-435]. Notwithstanding the pervasive effect of the broadcasting media (see *F.C.C. v. Pacifica Foundation* (1978) 438 U.S. 726, 748 [57 L.Ed.2d 1073, 1093, 98 S.Ct. 3026]; Note, *The Future of Content Regulation in Broadcasting* (1981) 69 Cal.L.Rev. 555, 580-581) and the unique access afforded children (*F.C.C. v. Pacifica Foundation, supra*, 438 U.S. 726, 749 [57 L.Ed.2d 1073, 1093]), the effect of the imposition of liability could reduce te U.S. adult population to viewing only what is fit for children. (See *Butler v. Michigan* (1957) 352 U.S. 380, 383 [1 L.Ed.2d 412, 414, 77 S.Ct. 524].) Incitement is the proper test here. (See *Kingsley Pictures Corp. v. Regents* (1959) 360 U.S. 684, 688 [3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362].) In areas outside of obscenity the United States Supreme Court has "consistently held that the fact that protected speech may be offensive to some does not justify its suppression. See, *e.g.*, *Cohen v. California*, 403 U.S. 15 (1971)." (*Carey v. Population Services International* (1977) 431 U.S. 678, 701 [52 L.Ed.2d 675, 694, 97 S.Ct. 2010].) Just as the advertising in *Carey, supra*, was not "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" (*Brandenburg v. Ohio, supra*, 395 U.S. 444, 447 [23 L.Ed.2d 430, 434], quoted in *Carey v. Population Services International, supra*, 431 U.S. 678, 701 [52 L.Ed.2d

675, 694]), the television broadcast which is the subject of this action concededly did not fulfill the incitement requirements of *Brandenburg*. Thus it is constitutionally protected.

Appellant would distinguish between the fictional presentation of "Born Innocent" and news programs and documentaries. But that distinction is too blurred to protect adequately First Amendment values. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." (*Winters v. New York, supra,* 333 U.S. 507, 510 [92 L.Ed. 840, 847, 68 S.Ct. 665].) If a negligence theory is recognized, a television network or local station could be liable when a child imitates activities portrayed in a news program or documentary. Thus, the distinction urged by appellant cannot be accepted. (See Krattenmaker and Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory* (1978) 64 Va.L.Rev. 1123, 1169 fn. 253. For a similar conclusion regarding content regulation, see Note, *Regulation of Programming Content to Protect Children After Pacifica* (1979) 32 Vand.L.Rev. 1377, 1410-1411.) "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech. . . ." (*Whitney v. California* (1927) 274 U.S. 357, 378 [71 L.Ed. 1095, 1107, 47 S.Ct. 641] [conc. opn. of Brandeis, J.], overruled by *Brandenburg v. Ohio, supra,* 395 U.S. 444 [23 L.Ed.2d 430]; see *Kingsley Pictures Corp. v. Regents, supra,* 360 U.S. 684, 689 [3 L.Ed.2d 1512, 1516]; *Zamora v. Columbia Broadcasting System* (S.D.Fla. 1979) 480 F. Supp. 199, 206.) The trial court's determination that the First Amendment bars appellant's claim where no incitement is alleged must be upheld.

Appellant argues from *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40 [123 Cal.Rptr. 468, 539 P.2d 36], that the First Amendment should not bar a negligence action.

In *Weirum*, the California Supreme Court upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. The court emphasized that the youthful contestants' reckless conduct was stimulated by the radio station's broadcast. (*Id.*, at p. 47.) Limiting its ruling, the court indicated that "[t]he giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. . . . In [other] situations there [was] no attempt, as here, to generate a competitive pursuit on public streets, accelerated by *repeated importuning* by radio to be the very first to arrive at a particular destination." (*Id.*, at p. 48; italics added.) Disposing of the radio station's First Amendment claim, the court said: "Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." (*Id.*) Although the language utilized by the Supreme Court was broad, it must be understood in light of the particular facts of that case. The radio station's broadcast was designed to encourage its youthful listeners to be the first to arrive at a particular location in order to win a prize and gain momentary glory. The *Weirum* broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. No such urging can be imputed to respondents here. Appellant only alleges that the teenage viewers

of "Born Innocent" acted on the stimulus of the broadcast rather than in response to encouragement of such conduct. *Weirum* does not control the present case.

Appellant also relies on *F.C.C. v. Pacific Foundation, supra,* 438 U.S. 726 [57 L.Ed.2d 1073]. But the narrowness of the *Pacifica* decision precludes its application here. "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its *regulatory* power does not depend on proof that the pig is obscene." (*Id.,* at pp. 750-751 [57 L.Ed.2d at pp. 1094-1095]; italics added.) Furthermore, Justice Powell in his concurrence emphasized that the court is not free "to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." (*Id.,* at p. 761 [57 L.Ed.2d at p. 1101] [conc. opn. of Powell, J.].) As the United States District Court indicated in *Zamora v. Columbia Broadcasting System, supra,* 480 F.Supp. 199, 206, reliance on *F.C.C. v Pacifica Foundation* "is misplaced because of both the factual and legal bases for that decision." Other methods of controlling violence on television must be found. *Pacifica* deals with regulation of indecency, not the imposition of general tort liability. Imposing liability on a simple negligence theory here would frustrate vital freedom of speech guarantees. *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed. 2d 789, 94 S.Ct. 2997], is also to be distinguished: There the United States Supreme Court recognized the power of the states to impose civil liability for defamation "so long as the States [do] not impose liability without fault." (418 U.S. at p. 339 [41 L.Ed.2d at p. 804].) The holding does not extend more broadly to tort liability for speech in areas outside the law of defamation.

The judgment is affirmed.

Caldecott, P. J., and Poché, J., concurred.

Appendix B

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION FOUR

No. 46981

Filed—January 6, 1982

OLIVIA NIEMI, etc.,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,

Defendants and Respondents.

BY THE COURT:

The petition for rehearing is denied.

Dated: January 6, 1982

CALDECOTT, P.J.

Appendix C

ORDER DUE
February 5, 1982

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 46981

Filed—February 3, 1982

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

OLIVIA N., a minor, etc.

v.

NATIONAL BROADCASTING CO., INC. ET AL.

Appellant's petition for hearing DENIED.

Mosk, J., and Broussard, J., are of the opinion that the petition should be granted.

Filed: February 3, 1982

BIRD,
Chief Justice

Appendix D

In the Superior Court of the State of California
In and For the City and County of San Francisco
No. 681 053
Filed—August 8, 1978

Olivia Niemi, a minor, by and through her
Guardian ad Litem, Valeria Pope Niemi,
Plaintiff,

vs.

National Broadcasting Company, Inc., and
Chronicle Broadcasting Company,
Defendants.

Judge Robert L. Dossee

The Court: I have reached a decision in the case.

I have made some notes. As Justice Christian, who wrote the earlier decision in this case said, "We commence with the recognition of the overriding Constitutional principle that material communicated by the public media, including fictional material such as the television drama here at issue has generally been accorded protection under the First Amendment of the Constitution."

This freedom is not absolute, however. Certain narrowly limited classes of speech are not protected, and one of these categories is incitement.

This case involves incitement. It's a situation where third parties watching this program went out and did something. This is the area of incitement. This has been recognized by two justices, the Court of Appeal in this

very case, and the first judge to whom this case was assigned for trial.

As to the meaning of incitement, the previous Court of Appeals decision in this case cites and sets forth the definition of Brandenberg versus Ohio, a 1969 decision of the Supreme Court of the United States of America. The Brandenberg definition is the product of a long evolutionary process in the Supreme Court of the United States. It is the present state of the law and has been relied upon by our own Supreme Court of California.

This definition, the only definition, requires the element of intent.

I've also considered the other exceptions which the opening statement of Mr. Lewis may have given rise to, such as indecency within the context of the FCC versus Pacifica case. In that case the Court in its own language emphasized the narrowness of its holding and was a case where no formal sanctions were imposed and merely a declaratory order was at stake, not criminal prosecution nor civil liability.

I've considered the Weirum case, which Justice Draper described as having doubtful application in this case. Weirum involved a defendant who actually urged his listeners to participate in an inherently dangerous situation. The case has no application to the facts here.

Under the present state of the law, I must grant the defendant's motion, the motion for nonsuit.

The court is adjourned.

Appendix E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil 40580 (Superior Court No. 681-053)

Filed—Oct. 26, 1977

OLIVIA N., a minor,

Plaintiff and Appellant.

vs.

NATIONAL BROADCASTING CO., INC., et al.,

Defendants and Respondents.

Olivia N. appeals from a judgment of dismissal which the court rendered before the commencement of a scheduled jury trial in her action against respondents National Broadcasting Co., Inc. and the Chronicle Broadcasting Company.

Appellant's complaint sought damages from respondents for injuries allegedly inflicted upon her by certain juveniles who were acting upon the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." The subject matter of the television film was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state. In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face.

Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a "plumber's helper," waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

It is alleged that appellant, aged nine, was attacked by minors at a beach in San Francisco. It is alleged that the minors attacked appellant and another minor girl, and forcibly and against her will, "artifically raped" appellant with a bottle. The complaint alleges that the assailants had seen the "artificial rape" scene in "Born Innocent" and that the scene "caused them to decide to do a similar act to a minor girl."

When the case came on for jury trial, respondents moved, before impanelment of a jury, that the court first determine for itself the "constitutional fact" of "incitement"—i.e., whether the film, "Born Innocent," was a vehicle for "inciting" violent and depraved conduct such as the crimes of the juveniles in the present case, of which appellant was the victim.

The trial judge viewed the entire film, made a finding that it did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement," and rendered judgment for respondents without impaneling a jury. The present appeal followed.

Analysis of this appeal commences with recognition of the overriding constitutional principle that material communicated by the public media, including fictional material

such as the television drama here at issue, is generally to be accorded protection under the First Amendment to the Constitution of the United States. (*Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U.S. 495, 501; *Winters* v. *New York* (1948) 333 U.S. 507, 510.) In *Joseph Burstyn, Inc.* v. *Wilson, supra,* at p. 501, the court stated:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U.S. 507, 510 (1948):
>
> > "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

(Fn. omitted; *see also Kingsley Pictures Corp.* v. *Regents* (1959) 360 U.S. 684, 690.) "There is no doubt that entertainment, as news, enjoys First Amendment protection." (*Zacchini* v. *Scripps-Howard Broadcasting Co.* (June 28, 1977) 45 L.W. 4954, 4958.) As the court stated in *Rosenbloom* v. *Metromedia* (1971) 403 U.S. 29, 41:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940).

Specifically, television broadcasting is a medium which is entitled to First Amendment protection. (See *Red Lion Broadcasting Co.* v. *FCC.* (1969) 395 U.S. 367, 386; *Writers Guild of America, West, Inc.* v. *F.C.C.* (C.D.Cal. 1976) 423 F.Supp. 1064, 1147.) Thus, expression by means of television dramatization is included within the free speech and free press guarantees of the First and Fourteenth Amendments. Where a television broadcast does not involve unprotected speech, the constitutional protection for free speech limits the state's power to award damages in a negligence action based upon the broadcast. (See *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 265, 277-278.)

The freedom of speech guaranteed by the First Amendment is not, of course, absolute. Certain narrowly limited classes of speech may be prevented or punished by the state consistent with the principles of the First Amendment. Speech which is obscene is not protected by the First Amendment. (*Miller* v. *California* (1973) 413 U.S. 15, 23, 34-35, reh. den. 414 U.S. 881.) "Born Innocent" is not constitutionally obscene. "[L]ibel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" are also outside the scope of constitutional protection. (*Konigsberg* v. *State Bar* (1961) 366 U.S. 36, 49, fn.10.) Generally, libel and slander are considered outside the

scope of First Amendment protection because "there is no constitutional value in *false* statements of *fact*." (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 340; emphasis added.) However, the free speech guarantee even requires that some protection be given to falsehood, in certain circumstances, "in order to protect speech that matters." (*Gertz* v. *Robert Welch, Inc., supra,* at p. 341.) The constitutional freedom for speech and press also does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." (*Giboney* v. *Empire Storage Co.* (1949) 336 U.S. 490, 498.) Additionally, speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, is also outside the scope of First Amendment protection. (See *Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447-448.)

The question whether the television film "Born Innocent" falls within any category of unprotected speech may, where the facts are not disputed, constitute a question of law. (*L.A. Teachers Union* v. *L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556; *Johnson* v. *County of Santa Clara* (1973) 31 Cal.App.3d 26, 32.) In the present case, the film itself was available and the court might perhaps have determined from viewing it in connection with a motion for summary judgment, that the film did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement." (See *Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 56, reh. den. 414 U.S. 881; *Jenkins* v. *Georgia* (1974) 418 U.S. 153, 159-160, 161; *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 574.) But a motion for summary judgment had earlier been

denied by another judge. No such motion was pending when the trial judge rendered the decision now under review.

Trial by jury had been demanded by appellant. That demand put into operation her right, under California Constitution, article I, section 7, to have all fact issues in the case determined by a jury. The trial court's action in viewing the film, and thereupon making fact findings and rendering judgment for respondents, was a violation of appellant's constitutional right to trial by jury. It was both reversible error and an act in excess of jurisdiction. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 73, p. 2908.)

Here, it is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a re-evaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a "constitutional fact." (*Rosenbloom* v. *Metromedia, supra,* 403 U.S. 29, 54.) But the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, "Born Innocent," resulted in actionable injuries.[1] (Cf. *Weirum* v. *RKO General, Inc.* (1975) 15 Cal.3d 40.)

The judgment is reversed with directions to impanel a jury and proceed to trial of the action.

CHRISTIAN
Christian, J.

We concur:

RATTIGAN
Rattigan, Acting P.J.*

EMERSON
Emerson, J.**

* Under assignment by the Chairman of the Judicial Council.
** Retired judge of the superior court sitting under assignment

Appendix F

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION FOUR

No. 40580

Filed—November 23, 1977

OLIVIA NIEMI, etc.,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., ET AL.,

Defendants and Respondents.

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated: November 23, 1977

CHRISTIAN, J.,
Acting P.J.

Appendix G

ORDER DUE
January 24, 1978

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 40380

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

OLIVIA N., a minor,

v.

NATIONAL BROADCASTING COMPANY, INC. ET AL.

Respondents' petition for hearing denied.

Tobriner, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

Filed: January 19, 1978

/s/ BIRD,
Chief Justice

Appendix H

In the Supreme Court of the United States

October Term, 1977

No. 77-1308. NATIONAL BROADCASTING CO., INC., ET AL. *v.* NIEMI. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 74 Cal.App.3d 383, 141 Cal.Rptr. 511.

Appendix I

NATIONAL BROADCASTING CO., INC., ET AL. *v.* NIEMI, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM

ON APPLICATION FOR STAY

No. A-652. Decided February 10, 1978

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have requested that I stay the commencement of a civil trial in the Superior Court of the City and County of San Francisco in which they are defendants in order that they may have an opportunity to apply for and obtain a writ of certiorari from this Court to review the judgment of the Court of Appeal of the State of California filed October 26, 1977. That court reversed the judgment of dismissal rendered by the Superior Court in a case wherein respondent sought damages from petitioners for injuries allegedly inflicted upon her by persons who were acting under the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." Applicants contend that the First and Fourteenth Amendments to the United States Constitution prevent their being subjected to liability and damages in an action such as this, and intend to petition this Court for certiorari to review the judgment of the Court of Appeal remanding the case for trial.

I find it unnecessary to determine whether four Justices of this Court would vote to grant a petition for certiorari by these

applicants to review a California judgment sustaining a judgment for damages against them on the basis described above in the face of their claim that the First and Fourteenth Amendments prohibit the rendering of such a judgment. The only question before me is whether those same constitutional provisions would be thought by at least four Justices of this Court to call for the granting of a writ of certiorari to review the interlocutory judgment of the state Court of Appeal which did no more than remand the case for a trial on the issues joined. I am quite prepared to assume that the Court would find the decision of the Court of Appeal sought to be stayed a "final judgment" for purposes of 28 U. S. C. § 1257 (2) pursuant to its holding in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). But the mere fact that the Court would have jurisdiction to grant a stay does not dispose of all the prudential considerations which, to my mind, militate against the grant of the application in this case. Every year we grant petitions for certiorari or note probable jurisdiction in cases in which we ultimately conclude that a state or federal court has failed to give sufficient recognition to a federal constitutional claim, and have as a consequence reversed the judgment of such court rendered upon the merits of the action. But this is a far cry from saying that this Court would have stayed further proceedings in the same cases at an interlocutory stage comparable to the case now before me.

True, in the case of double jeopardy, we have held that the subjecting of the defendant to the second trial itself is a violation of the constitutional right secured by the Sixth Amendment, *Abney* v. *United States*, 431 U. S. 651, 660–661 (1977), even though any judgment of conviction rendered in that trial would be subject to ultimate reversal on appeal. The same doctrine is found in cases more closely resembling this such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Cox, supra*. But in both *Tornillo* and in *Cox* the First and Fourteenth Amendment claims were far more precisely

drawn as a result of the decisions of the state courts than is the case here. A reading of the opinion of the Court of Appeal indicates that it might have been based on a state procedural ground, by reason of the fact that the trial judge, himself, after denial of a motion for summary judgment but before the empanelment of a jury, viewed the entire film and rendered judgment for applicants because he found that it did not "advocate or encourage violent and depraved acts and thus, did not constitute an 'incitement.'" The Court of Appeal held that this was a violation of respondent's right to trial by jury guaranteed her by the California Constitution, and went on to state that:

> "[I]t is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a reevaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a 'constitutional fact.' (*Rosenbloom* v. *Metromedia, supra,* 403 U. S. 29, 54 . . . .)" *Olivia N.* v. *National Broadcasting Co., Inc.*, 74 Cal. App. 3d 383, 389, 141 Cal. Rptr. 511, 514 (1977).

The contours of California tort law are regulated by the California courts and the California Legislature, subject only to the limitations imposed on those bodies by the United States Constitution and laws and treaties enacted pursuant thereto. In the principal case relied upon by applicants in support of their stay, *United States* v. *Shipp*, 203 U. S. 563 (1906), "a sheriff allowed appellant to be lynched pending appeal to this Court of his conviction." A requirement to defend an action such as applicants are now required to defend in the Superior Court, and if unsuccessful there to post a supersedeas bond and prosecute their constitutional claims through the

normal appellate process to this Court, is scarcely a comparable example of irreparable injury. Since I find that applicants' claims of irreparable injury resulting from the judgment of the Court of Appeal in this case are not sufficient to warrant my granting their application, I accordingly deny the stay.

So ordered.

Appendix J

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681 053
Filed—September 20, 1976

OLIVIA NIEMI, a minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE BROADCASTING COMPANY,

Defendants.

MEMORANDUM OF INTENDED DECISION

The motion picture and television screen play entitled "BORN INNOCENT" broadcast by the defendant television station at 8:00 p.m. on the evening of September 10, 1974, totalling two hours in length was viewed by the Court for two reasons:

Firstly, to determine at a time convenient to Court and counsel whether or not the film in part or in its entirety would be allowed into evidence and viewed by a jury;

Secondly, the film was viewed by the Court for the purpose of finding the Constitutional fact necessarily involved in the question of whether it was protected by the First Amendment of the United States Constitution and Section

9, Article I of the Constitution of the State of California as asserted by defendant.

The Court viewed the film with the agreement of counsel in order to make possible both determinations.

It is the opinion of the Court that the television screen play entitled "BORN INNOCENT" is fully protected by the First Amendment of the Constitution of the United States of America and by Section 9 Article I of the Constitution of the State of California.

In arriving at this decision the Court took into account the offer of proof by counsel for the plaintiff, and furthermore assumed the facts alleged in the complaint to be true.

The motion by counsel for the defense for judgment on the pleadings and the nonstatutory procedure set forth at *Volume 4* of *Witkin's California Procedure* at page 2816 is granted and judgment will be entered for the defendants.

Insofar as counsel for the plaintiff has requested findings of fact and conclusions of law, the Court directs counsel for the defendant to prepare the same. However, it should be understood that the premier fact found by this Court is that the film is Constitutionally protected, and the conclusion of law is based not only upon that preliminary and premier Constitutional fact, but based upon all of the facts set forth in the pleadings by the plaintiff and his offer of proof.

The Court also grants the motion to exclude the film from evidence, and without the film, plaintiff has no cause of action against the defendant. That being the case, there was and is no profit to the plaintiff to proceed by the more usual procedure of waiting until a jury is selected and granting a nonsuit after plaintiff's opening statement, it being the plaintiff's position that everything that could be said on behalf of his case was said during the two days of

discussion and oral and written argument. Furthermore, even less profit would flow to the orderly administration of justice and the position of the plaintiff if a nonsuit were to be granted at the conclusion of his case.

In effect, the Court's ruling on the pleadings and in ruling in advance on the evidence is comparable in practice and in theory to Penal Code Section 1538.5, which has been so successfully used in the criminal law to suppress evidence that is Constitutionally inadmissible.

The Court is of the opinion that *Weirum* v. *RKO General Inc.*, 15 Cal. 3d 40 (1975) is not applicable.

The State of California is not about to begin using negligence as a vehicle to freeze the creative arts.

Dated: September 17, 1976.

/s/ JOHN A. ERTOLA
Judge of the Superior Court

Appendix K

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 681-053

Filed—September 29, 1976

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING CO., INC., CHRONICLE BROADCASTING CO.,

Defendants.

JUDGMENT

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved for judgment on the legal issue, the Court having viewed the motion picture "Born Innocent," the matter having been argued and submitted, and the Court having issued its Memorandum of Intended Decision and Findings of Fact and Conclusions of Law, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff, together with their costs of suit in the sum of $ NONE.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
Judge

Appendix L

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 681-053

Filed—September 29, 1976

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING CO., INC., CHRONICLE BROADCASTING CO.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved the Court for judgment on the issue of law, and the Court having viewed the motion picture "Born Innocent" and issued its Memorandum of Intended Decision herein, and good cause appearing therefor, the Court makes the following:

FINDING OF FACT

1. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

CONCLUSIONS OF LAW

1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.

2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.

3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
Judge

Opposition

Office - Supreme Court, U.S.
FILED
MAY 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OLIVIA NIEMI, a minor, by and through her guardian Ad Litem,

Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE BROADCASTING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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May 29, 1982

Question Presented

Whether, in an action seeking to hold television broadcasters liable in negligence for the criminal acts of third parties who having seen or heard of a scene in a television drama allegedly imitated such scene, the California courts erred in holding that First Amendment standards had to be satisfied?

Parties Below

The parties to the proceedings below were Olivia Niemi, by and through her guardian ad litem, Valeria Pope Niemi, plaintiff, and National Broadcasting Company, Inc. and Chronicle Broadcasting Company, defendants.*

Chronicle Publishing Company, which was included in the caption to the petition in the place of Chronicle Broadcasting Company, was not a named defendant below.

As required by Supreme Court Rule 28.1, National Broadcasting Company, Inc. ("NBC") advises the Court that its parent company is the RCA Corporation ("RCA"). NBC has no subsidiaries other than wholly-owned subsidiaries. RCA has no subsidiaries or affiliates incorporated under the laws of any of the United States other than wholly-owned subsidiaries except for United Truck Leasing, Inc. and Hertz Penske Truck Leasing, Inc. Chronicle Broadcasting Company ("Chronicle Broadcasting") advises the Court that its parent company is Chronicle Publishing Company ("Chronicle Publishing"). Chronicle Broadcasting has no subsidiaries other than wholly-owned subsidiaries. Chronicle Publishing has no affiliates or subsidiaries other than wholly-owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2045

OLIVIA NIEMI, a minor, by and through her guardian Ad Litem,

Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE BROADCASTING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The oral opinion of the Superior Court of California in and for the City and County of San Francisco (Dossee, J.) granting respondents' motion for nonsuit following petitioner's opening statement is unreported and is set forth as Appendix D to the petition. The unanimous opinion and order of the California Court of Appeal, First Appellate District, Division Four affirming the Superior Court's grant of nonsuit is reported at 126 Cal.App.3d 488, 178 Cal.

Rptr. 888 (1981) and is set forth as Appendix A to the petition. That court's order denying a petition for rehearing is unreported and is set forth as Appendix B to the petition. The order of the Supreme Court of California denying petitioner's request for a hearing is unreported and is set forth as Appendix C to the petition.

A prior appeal in this action was taken from a 1976 order of the Superior Court granting defendant's pre-trial motion for judgment. The opinion, the judgment and the Findings of Fact and Conclusions of Law of the Superior Court of California in and for the City and County of San Francisco (Ertola, J.) granting that motion are unreported and are set forth in the petition as Appendices J, K and L, respectively. The opinion of the Court of Appeal reversing that judgment of the Superior Court and remanding the case to the Superior Court for trial is reported at 74 Cal. App.3d 383, 141 Cal.Rptr. 511 (1977) and is set forth as Appendix E to the petition. That court's order denying a petition for rehearing and the order of the Supreme Court of California denying respondents' petition for hearing with respect to that judgment are unreported and are set forth as Appendices F and G to the petition. The opinion of Justice Rehnquist denying defendants' application for a stay of the trial pending this Court's disposition of a petition for a writ of certiorari with respect to the order remanding the case and the order of this Court denying the petition are reported at 434 U.S. 1354 (1978) and 435 U.S. 1000 (1978), respectively and are set forth as Appendices I and H to the petition.

Jurisdiction

Respondents assume that petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) (1976).*

Statement of the Case

In this action, petitioner sought to hold television broadcasters liable for injuries she suffered as a result of a criminal attack upon her by a teenage girl and her companions. Petitioner asserted that the assault was caused by a television drama entitled "Born Innocent"—broadcast by respondents—in that the attackers allegedly imitated aspects of a scene in that drama.

"Born Innocent"

"Born Innocent" was broadcast to a national television audience on the NBC television network on September 10, 1974. It portrayed, in fictional dramatic form, the life of an unwanted teenager and society's ineffective and ultimately destructive efforts to deal with her. It concerned a fourteen-year-old girl ("Chris") who is committed to a reformatory as a runaway. She is thrown together with jaded adolescent girls who resent her cooperative attitude towards the reformatory authorities and the affection she wins from a classroom teacher. In one scene in the drama, several actresses playing other residents of the institution simulate a sexual assault on Chris with a wooden object in the reformatory shower room. The events depicted in the scene form part of the process by which Chris's character is hardened in response to the conditions in the institution

* The petition, apparently inadvertently, refers to "§ 1253(3)" as the basis for jurisdiction. (Petition ["Pet."] at 3)

and reflect the reality of juvenile institutions and the lives of girls who come to live in them. The film is a bleak and serious examination of a continuing national problem.

Proceedings Below

On October 9, 1974, petitioner filed her complaint alleging that the assault scene in "Born Innocent" caused certain minors "to decide to do a similar act" and that respondents were thereby the proximate cause of an assault on Olivia N. (C.T. 1-8)* Prior to trial, respondents sought and were denied summary judgment. Thereafter the case was assigned for trial but, before impaneling the jury, the trial judge viewed the film "Born Innocent", permitted petitioner to make an offer of proof and granted judgment for respondents, finding that the film was not "in whole or in part, directed to inciting or producing imminent lawless action." (Pet. App. L at A-35)** Petitioner appealed the ruling arguing, *inter alia*, that the trial court had acted improperly in viewing the film and making factual findings as to incitement. Petitioner urged that the question of incitement had to be determined by a jury and offered to prove that "this picture did incite the crime in question." (1977 Opening Brief to Court of Appeal 10; 1977 Closing Brief 60)

On that appeal, the Court of Appeal held that the trial court's action in viewing the film deprived petitioner of the right "to have all fact issues in the case determined by a jury" (*Olivia N.* v. *National Broadcasting Co.*, 74 Cal.App. 3d 383, 389, 141 Cal.Rptr. 511, 514 (1st Dist. 1977) (Pet.

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* References to "C.T." are to appropriate pages of the Clerk's Transcript in the Superior Court.

** References to "Pet. App." are to appropriate pages of the Appendix to the petition.

App. E at A-20)) and it remanded the case to the trial court. The California Supreme Court and this Court denied interlocutory review. (Pet. App. G and H)*

On remand, during the course of argument on a pretrial motion, petitioner's counsel for the first time conceded an inability to establish the elements of incitement and thus admitted for the first time that no "fact issues" existed as to incitement. (R.T. 133; *see* R.T. at 120.)** Petitioner's counsel also made clear his view that the First Amendment was of no relevance to a negligence case (*see, e.g.*, R.T. at 120, 522, 619-620) and announced that he would—quite literally—refuse to try the case if incitement were required to be proved. (*See, e.g.*, R.T. at 600, 612.) Petitioner's counsel stated that he would disclaim in his opening statement to the jury any intent to prove incitement. (*See* R.T. at 614.) And, during the course of that statement, he explicitly did so. (R.T. at 669)

At the conclusion of petitioner's opening statement respondents moved for nonsuit under Cal. Civ. Proc. Code Section 581c (West 1976) and under the First Amendment to the United States Constitution and Article I of the California Constitution.*** (R.T. at 767) After extended argument (R.T. at 767-827) and after petitioner's counsel again stipulated in open court as to his inability to meet

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* An application for a stay of the proceeding pending this Court's disposition of that petition was denied by Justice Rehnquist. *National Broadcasting Co.* v. *Niemi*, 434 U.S. 1354 (1978) (Pet. App. I).

** References to "R.T." are to appropriate pages of the Reporter's Transcript before the Superior Court.

*** At the time this action was commenced the free speech clause of the California Constitution was set forth in Article I, Section 9 of the California Constitution. During the course of this action the California Constitution was amended and the free speech clause was expanded and redesignated as Section 2 of Article I.

the incitement standard (R.T. at 768), the Superior Court granted the motion for nonsuit.*

The Court of Appeal affirmed the grant of nonsuit in a detailed and careful opinion (*Olivia N. v. National Broadcasting Co.*, 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1st Dist. 1981) (Pet. App. A)) and denied petitioner's request for rehearing (Pet. App. B). Petitioner's request for a hearing by the Supreme Court of California was denied. (Pet. App. C) This petition followed.

The Factual Posture

In this case, nonsuit was granted after petitioner's opening statement; accordingly, under California law, petitioner's factual contentions, set forth in her opening statement, are treated as true for the purposes of the petition, as they were so treated before the courts below. Having said that, two substantial caveats are appropriate. First, many contentions in the opening statement are demonstrably inaccurate, as reference to the full record or other sources would readily indicate.** While it is neither feasible nor procedurally appropriate to respond to all of these misstatements here, we wish to emphasize that in accepting petitioner's factual contentions as asserted in her opening

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* The Superior Court's oral opinion is set forth as Appendix D to the petition.

** The nature of the opening statement may reflect the unusual posture in which it was given. Petitioner's counsel invited a nonsuit motion as a means of testing his legal theory before the Court of Appeal. He sought an opportunity "to make a complete statement that I would have made on my pleadings, as I see them . . . [a]nd then Counsel will make a motion for an order directing verdict. I then can go on petition . . . to the Court of Appeals (sic) . . . ." (R.T. at 622; *see also* R.T. at 607.) In this sense the record may reflect an idealized construct designed for a "test case" rather than a full factual record honed by the demands of the adversarial process at trial.

statement for purposes of this petition, we in no way accept the accuracy of any of those contentions.

Second, in addition to misstatements made in the opening statement, the petition before this Court misstates even the substance of the opening statement itself. Some of these misstatements do warrant comment and we note them in the course of summarizing the principal contentions of the opening statement in order to make clear the nature of the record upon which the petition is premised.

Principal Contentions in Petitioner's Opening Statement

Petitioner was attacked on Baker Beach on September 13, 1974 by Sharon Smith ("Smith"), 15, and three companions, aged 15, 14 and 10. The attack was the culmination of an argument. Smith and others of her companions slapped, pinched and otherwise struck both Olivia and her companion. (Opening Statement at R.T. 738:1-6, 738:25-28) Finally, Smith, and, petitioner suggests, another girl, assaulted Olivia with a bottle, causing bruises and lacerations. (*Id.* at 738:14-24)

Smith and her three companions were later apprehended. (*See id.* at 739:16-24; 740:13-15.) Smith was eventually placed in federal prison;* the others were treated as juveniles and released to the custody of their parents. (*Id.* at 740:13-15) Despite petitioner's assertion to this Court that her attackers were "four otherwise average children" (Pet. at 20), her counsel asserted in the opening statement that Smith was prone to depression and other potential psychiatric problems and that before the Baker Beach incident, Smith had been subject to sexual advances by her father. (*Id.* at 731, 744)

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* Smith had elected to be treated as an adult and pleaded guilty to the charge of assaulting petitioner with a weapon. Opening Statement at R.T. 740:10-12.

Although the petition implies that the attackers saw the assault scene in "Born Innocent" (Pet. at 12-13), the opening statement actually reflects that this may well not be true. While petitioner's counsel offered to show that some members of the Smith group saw the scene (*id.* at 734:1-25; 740:4-5), he acknowledged that three of the participants, including Smith herself, had explicitly denied watching the presentation of "Born Innocent" at all. (*Id.* at 731-32) Petitioner did contend that each of the four, including Smith, had *heard* about the scene in "Born Innocent" prior to the Baker Beach incident. (*Id.* at 730-33)

Petitioner offered to introduce testimony that it was foreseeable that third parties would commit a criminal act in imitation of the assault scene and hence that the film's broadcast was negligent and reckless. Petitioner argued that it was negligent to precede the broadcast with an audience advisory suggesting parental discretion since "an advisory to a child is like a red flag to a bull." (*Id.* at 706) Paradoxically, petitioner also asserted that respondents were negligent in *not* using an audio as well as a visual advisory. (*Id.* at 705:26-27) Petitioner disparaged the artistic and social value of the film generally and specifically disclaimed the intention to prove incitement in any form. (*Id.* at 669)

Summary of Argument

Notwithstanding the unique factual posture of this case or its complex procedural history, one principle has consistently been recognized by each of the courts which has come to consider it—that the invocation of common law negligence does not require or justify the disregard of constitutional requirements. It is that principle which petitioner, having failed to persuade the California courts that

their own prior decisions somehow cast this basic tenet of law in doubt, seeks to challenge here.

The Court of Appeal was clearly correct in holding that a film such as "Born Innocent" is presumptively protected by the First Amendment and that a theory of liability premised on the criminal acts of third parties who either saw or heard of its broadcast must be assessed in light of First Amendment standards. The unexceptionable approach of the Court of Appeal—one in accord with that of every other court which has considered the type of claim raised by petitioner—provides no occasion for review by this Court.

ARGUMENT

The Decision of the California Court of Appeal Is Clearly Correct and Is Consistent With That of Every Court Which Has Had Occasion to Consider This Issue.

What is most striking about petitioner's theory of this case is its central proposition—that principles of negligence law should prevail over the limitations imposed by the First Amendment. Petitioner urges, for example, that a writ of certiorari should be granted so that this Court may "decide whether traditional negligence principles provide sufficient protection to First Amendment rights without unduly chilling the creative arts." (Pet. at 19) That the purpose of a federal constitution is to provide a check on interpretations of common law or statutory provisions that threaten protected freedoms, is lost in petitioner's analysis. Recognizing that this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) established that the First Amendment limits and qualifies tort liability, the Court of Appeal's decision faithfully reaffirms the proper role the Constitution was chosen to play

in our system of law. *Olivia N.* v. *National Broadcasting Co.*, 126 Cal.App.3d 488, 492-93, 178 Cal.Rptr. 888, 892 (1st Dist. 1981) (Pet. App. A at A-6-A-7; *See also* Pet. App. E at A-16-A-18).*

Petitioner's argument as to the inapplicability of First Amendment principles in this context is self-evidently wrong. Throughout this litigation her counsel has relied on a single decision of the Supreme Court of California, *Weirum* v. *RKO General, Inc.*, 15 Cal.3d 40, 539 P.2d 36, 123 Cal.Rptr. 468 (1975), which, it was claimed, adopted that view. *Weirum*, petitioner urged below, established in California that the First Amendment had no application in a negligence case. The Court of Appeal now has flatly rejected petitioner's view of that decision, and the Supreme Court of California declined even to grant a hearing on the issues raised by petitioner. Thus, the California courts in no way share the omnipotent view of California negligence law upon which petitioner relies.**

Petitioner's theory that broadcasters should be subject to liability for imitation of broadcast dramatic works is profoundly dangerous. The theory could expose to liability a broadcast of Shakespeare's or O'Neill's plays, an adapta-

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* In *Sullivan* this Court rejected an argument, substantially identical to petitioner's here, that once the elements of a tort (libel there) were established, the First Amendment had no role to play:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 269 (footnotes omitted).

** During the course of this litigation, respondents consistently have denied that petitioner could establish a negligence claim and the California courts have never determined whether petitioner's claim was sufficient under California law.

tion of a Hemingway, Steinbeck or Faulkner novel or more mundane television fare. Dramatic works aside, the theory, for all of petitioner's disclaimers, might, as the Court of Appeal recognized (126 Cal.App.3d at 495, 178 Cal.Rptr. at 893; Pet. App. A at A-8), apply as well to a telecast on the evening news of films of riots or strife in our cities, of assassinations or threats to our leaders or of warfare and violence abroad. The destructive effect that such a tort, if unbridled by constitutional limitations, would have upon free expression is incalculable. The Court of Appeal properly rejected such an approach.

Petitioner takes issue with the Court of Appeal's holding that the incitement test articulated by this Court in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) provides the appropriate standard to be applied in this case. Instead, petitioner urges that if any constitutional protection at all is to be afforded here, the court in each instance must engage in an entirely *ad hoc* balancing approach to determine whether and to what extent expression should be protected. Petitioner would require a determination in each case of the societal weight to be attached to a particular program as part of a negligence analysis. Such subjective weighing of the relative worth of one news story against that of another, or against that of a particular drama or other form of protected expression, is precisely what the First Amendment has been held to preclude. The dangers of such an approach are apparent and the Court of Appeal properly eschewed this approach in favor of incitement analysis.

In adopting the standard for incitement articulated in *Brandenburg* v. *Ohio, supra,* the Court of Appeal ensured that speakers are afforded an opportunity to ascertain in advance precisely what expression puts them at risk by reference to definite and ascertainable standards. The existence of such standards also avoids making the speaker

a hostage to the aberrational reactions of disturbed listeners. *Cf. Cohen* v. *California*, 403 U.S. 15 (1971); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Far from providing speakers with the absolute immunity suggested by petitioner, the Court of Appeal's application of the test articulated by this Court in *Brandenburg* recognizes that a balance has already been struck in the formulation of that test, a formulation which takes account of the possible risk of violent action resulting from expression and of society's interest in free expression.

The approach followed by the California courts has been followed in each of the other jurisdictions which has had occasion to consider such "imitation" or "stimulation" theories in the context of civil tort claims. Thus, in three recent cases, federal and state courts have recognized that broadcasters cannot be held liable for alleged imitation of their televised programming when such programming falls short of incitement. *Zamora* v. *Columbia Broadcasting System*, 480 F.Supp. 199, 206 (S.D. Fla. 1979); *Walt Disney Productions, Inc.* v. *Shannon*, 247 Ga. 402, 276 S.E.2d 580, 582 n.2 (1981); *De Filippo* v. *National Broadcasting Co.*, C.A. No. 79-3678, slip. op. at 7-9 (R.I. Super. Ct. June 4, 1980) (appeal pending).* As the unanimity of approach suggests and as the California courts recognized, the significant role the First Amendment must play in such cases is clear and unexceptionable.

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* These decisions are also testament to the error of petitioner's claim that the incitement standard articulated in *Brandenburg* has not been employed in the civil context. *See also Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977); *Healy* v. *James*, 408 U.S. 169, 188-89 (1972).

CONCLUSION

For the reasons set forth above, it is submitted that the petition presents no basis for the granting of the writ by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE BROADCASTING CO.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. A RECENT REPORT RELEASED BY THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES HIGHLIGHTS THE TIMELINESS AND NATIONAL IMPORTANCE OF THE ISSUES RAISED HERE.

The critical importance of the issues raised by the present case, and virtually ignored by the Respondents' Brief in Opposition, have recently been addressed by the National Institute of Mental Health. Shortly after petitioner filed her petition, it released a report entitled "Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties" through the United States De-

partment of Health and Human Services. The report concludes that the "consensus" among scientists is that there is a "causal relationship" between televised violence and aggressive behavior by children and teenagers. Chapter 1, Ten Years of Scientific Progress: An Overview, p. 6 Violence and Aggression.

In reaching this conclusion, the report supported the findings of the 1972 Report of the Surgeon General's Scientific Advisory Committee on Television and Behavior. It stated that those previous suggestions of a link between violence and aggression have been "significantly strengthened." Chapter IV, Violence and Aggression, p. 37 Effects of Televised Violence. It was this very 1972 report which formed a significant part of Petitioner's Opening Statement since its conclusions were well known to respondents, who had agreed with them. (Petition, p. 12.) On a non-suit, this must be taken as true.

Thus, as suggested by the petition, it would be appropriate for this court to address this pressing social problem as it appears in the conflict between the First Amendment rights of television broadcasters to air what they wish and the rights of an injured victim to obtain compensation for physical harm caused by the exercise of those rights. Respondents have persistently mischaracterized petitioner's position as being that the First Amendment has "no application in a negligence case." (Brief in Opposition, p. 10.) On the contrary, the question presented to this court for resolution is how to strike the appropriate balance between these competing goals. Petitioner's contention is that shackling tort law with the criminal incite-

ment standard is to give too much weight to First Amendment goals. The important issue before this court is how to articulate the proper standards for First Amendment analysis where physical harm is foreseeably caused by speech.

This court has labored over a similar issue since 1964 in the area of defamation. It has established guidelines for the role of the First Amendment where the competing goal has been compensating for injury to reputation from speech. It is time for the court now to address the issue in the context of physical or mental injury foreseeably caused by speech, in this case by televised speech.

II. RESPONDENTS' DISTORTION OF THE FACTS SUPPORTS PETITIONER'S CONTENTION THAT INCITEMENT IS NOT THE PROPER STANDARD, BUT THAT A BALANCING IS REQUIRED INSTEAD.

While paying lip service to the established rule that upon a judgment for non-suit on an opening statement, all the facts stated therein must be taken as true (Brief in Opposition, p. 6), respondents nonetheless consistently contravene this principle by going outside Petitioner's Opening Statement or mischaracterizing the actual record as being in their favor instead of in petitioner's. (E.g., respondents' entire description of "Born Innocent" in their Brief in Opposition, pp. 3-4.) This is not an oversight, nor simply a misguided and overzealous attempt to gain the sympathy of the court. Rather, it is a mistake into which respondents logically must fall. It demonstrates that in

spite of themselves, respondents tacitly admit that petitioner's view of this case is proper.

If the trial court was correct in requiring petitioner to prove incitement, respondents' improper references and mischaracterization of "Born Innocent" would be irrelevant. That respondents feel it necessary to make them reveals their knowledge that the statements they make could be relevant to a negligence trial, at which the parties' conflicting factual claims would be resolved using the very balancing approach advanced by petitioner.

CONCLUSION

Respondents make no effort to establish that the issues raised by this case are not important ones which should be addressed by this court. Instead, they predictably point to the state court decisions already cited by petitioner which required incitement. (Brief in Opposition, p. 12; Petition, p. 11 fn.3.) Whether these decisions, as the one in the present case, *should* be the law is precisely the question presented. The framers of the Constitution hardly had television, or the type of psychology or psychiatry involved here, in mind.

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